Supreme Court, U. S.
FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-117

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BROILER MARKETING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
JOHN H. SHENEFIELD,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
JOHN J. POWERS, III,
BRUCE E. FEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	9
Argument	11
The language, legislative history and purposes of the Capper-Volstead Act show that integrated broiler producers are not "farmers"	11
A. The exemption for "farmers" applies only to persons who own or work on agricultural land	11
B. The integrators' financial stake in the broilers does not make them farmers	17
C. The Capper-Volstead Act should be construed narrowly	20
Conclusion	25

CITATIONS

Cases:	
Bayside Enterprises, Inc. v. *National Labor Relations Board*, 429 U.S. 298	7, 23
Cantor v. *Detroit Edison Co.*, 428 U.S. 579	6
Case-Swayne Co. v. *Sunkist Growers, Inc.*, 389 U.S. 384	8, 9, 12, 14, 15, 20
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185	14

253-894—78——1

Cases—Continued

	Page
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755	23
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349	22
Imco Poultry, 202 N.L.R.B. 259	22–23
Marshall v. *Abbott Farms, Inc.*, 559 F. 2d 1006	7, 23
Marshall v. *Gulf & Western Industries*, Inc., 552 F. 2d 124	23
Maryland and Virginia Milk Producers Association, Inc. v. *United States*, 362 U.S. 458	7, 12
National Labor Relations Board v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025	7
Northern Pacific Ry. v. *United States*, 356 U.S. 1	20
Otter Tail Power Co. v. *United States*, 410 U.S. 366	22
Simpson v. *Union Oil Co.*, 377 U.S. 13	6
United States v. *Borden Co.*, 308 U.S. 188	12, 20
United States v. *Imperial Irrigation District*, 559 F. 2d 509	17
United States v. *Sisson*, 399 U.S. 267	17
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	22
United States v. *Topco Associates*, 405 U.S. 596	20
Statutes and regulations:	
Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq*	17
Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291 *et seq.*:	
Section 1, 7 U.S.C. 291	2, 11
Sections 1–2, 7 U.S.C. 291–292	5

Statutes and Regulations—Continued

	Page
Capper-Volstead Act—Continued	
Section 2, 7 U.S.C. 292	12, 22
Clayton Act, Section 6, 38 Stat. 731, 15 U.S.C. 17	8
Cooperative Marketing Act of 1926, 44 Stat. 802, 7 U.S.C. 451 *et seq.*:	
7 U.S.C. 451–457	21
7 U.S.C. 453(a)	21
7 U.S.C. 455	8
Farm Credit Act of 1971, Title III, 85 Stat. 602, 12 U.S.C. (Supp. V) 2121 *et seq.*:	
12 U.S.C. (Supp. V) 2121–2134	21
12 U.S.C. (Supp. V) 2129	21
Food and Agricultural Act of 1977, Section 102a, Pub. L. 95–113, 91 Stat. 913	17
Sherman Act, Section 1, 26 Stat. 209, as amended, 15 U.S.C. 1	2, 5
28 C.F.R. 50.6	6
29 C.F.R. 780.126	23
Miscellaneous:	
Broiler Business (October 1976)	24
59 Cong. Rec. (1920):	
pp. 7855–7856	13
p. 8017	13
p. 8022	13
p. 8025	13
p. 8026	13
p. 8033	13
61 Cong. Rec. (1921):	
p. 1034	13
p. 1037	13
p. 1040	13
p. 1044	13

Miscellaneous—Continued
62 Cong. Rec. (1922): Page
p. 2048 13
p. 2050 12, 13
p. 2051 11, 12, 13
p. 2052 14, 15
p. 2058 12
pp. 2058–2059 14
pp. 2059–2060 11
p. 2060 11
p. 2156 11, 14
p. 2218 19
pp. 2274–2275 15
p. 2275 15, 16, 19
p. 2277 15
p. 2277–2278 15
Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. (1967) 17
H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921) 10, 11, 13
Kennedy, *Legal Formality*, 2 J. Legal Studies 351 (1973) 10
Landes and Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & Econ. 815 (1975) 10
S. Rep. No. 90-474, 90th Cong., 1st Sess. (1967) 17

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 111–132) is reported at 550 F. 2d 1380. The opinions of the district court (A. 81–90, 105–108) are not officially reported.

JURISDICTION

The judgment of the court of appeals (A. 133) was entered on April 22, 1977. The petition for a writ of certiorari was filed on July 21, 1977, and granted on October 11, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether poultry processors that neither own nor operate farms but that contract with growers to feed and raise chickens are "engaged in the production of agricultural products as farmers" within the meaning of the Capper-Volstead Act, 7 U.S.C. 291.

STATUTES INVOLVED

The pertinent portions of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, and the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291, are reproduced at Pet Br. 2–3.

STATEMENT

1. Petitioner is a marketing cooperative composed primarily of vertically integrated "broiler"[1] processors known as "integrators."[2] Most integrators own breeding flocks of chickens that lay eggs, from which chicks hatch. The integrators contract with independent "growers" to husband the chicks for seven to nine weeks (the "grow-out process") until they are large enough to slaughter.

The growers own the land and buildings in which the grow-out process occurs, and they supply the necessary labor. The integrators generally supply and own the birds, and they provide the necessary feed

[1] Broilers are chickens that are slaughtered at seven to nine weeks of age and processed for sale to supermarkets, restaurants, hotels and other institutions (A. 93).

[2] This statement of facts is based on the parties' statements of facts in the district court; it was stipulated (A. 91) that these facts are not disputed.

and veterinary services.[3] The integrators retrieve the grown birds and prepare them for sale (A. 114–115). Most of petitioner's members use independent growers to raise 80 percent or more of their broilers (A. 23).

The contract between an integrator and a grower usually requires the grower to provide the land, buildings, equipment, water, electricity, and labor needed to raise chicks from the day of birth to marketable size and weight (A. 24). Ordinarily, a grower must also supply litter for lining and fuel for heating the broiler houses (A. 26). The day-to-day management of the flocks is the responsibility of the grower (A. 24–25).[4]

The integrator assumes most of the financial risks of changes in the price broilers will fetch in the market (A. 14); the integrator risks capital by investing in each flock. The grower's investment is illiquid; it consists primarily of land, buildings and equipment (A. 10–11), and the growers' investment in these items exceeds the integrators' (A. 13, 23–24).[5]

[3] Petitioner's members have integrated their broiler production in varying degrees. Some operate processing plants and feed mills but purchase chicks from outside sources. Four members, although owning breeder flocks, hatcheries, and feed mills, have declined to invest in processing plants; their processing is done by another company under contract. Two members neither own nor operate broiler flocks, and they have no investment in breeder flocks, hatcheries or feed mills; their sole fixed investment in broiler production is in processing plants (A. 8).

[4] Some growers also are obligated to help the integrators catch and load grown-out broilers for transport to processing plants (A. 24).

[5] Integrators generally are larger businesses than growers, but in some cases growers' investment in broiler husbandry may ex-

The financial arrangements between the integrators and growers depend on the contracts between them, and their terms differ. Many contracts characterize the growers as independent contractors (A. 24–25); no contract characterizes the grower as an employee of the integrator. Particular contracts require growers, in addition to making the substantial investments and contributions discussed above: (1) to pay taxes on chicks, feed, grit, litter, fuel and sanitation products; (2) to pay for chick losses exceeding five percent; (3) to make up the integrator's lost profits if chicks die because of grower negligence; and (4) to pay for 50 percent of the cost of feed destroyed by fire or natural disaster (A. 28). Moreover, many growers receive no compensation for birds that die because of disease or foul weather during the grow-out phase (A. 25).

Many contracts also require the grower to share with the integrator the risk of market fluctuations. A typical contract specifies a minimum and maximum payment to the grower per bird or per pound. The minimum payment provided in some members' contracts is less than the cost incurred by the average grower in raising a flock (A. 26–27). Under contracts used by 23 integrators, the payment received is tied to the market price of broilers (A. 25). Under contracts used by 50 integrators, a grower's payment is

ceed an integrator's investment in breeder flocks, hatcheries and processing facilities (A. 13). Although the fixed costs incurred by integrators usually exceed the grower's fixed costs because of the disparity in size of operation, a substantially higher percentage of the grower's cost is fixed (A. 13, 65).

inversely related to the amount of feed supplied during the grow-out phase (A. 25). Two contracts tie a grower's compensation to the market price of feed or feed ingredients: the higher the price of feed, the lower the grower's compensation (A. 26). And most contracts permit an integrator to reduce payment levels for any new flock if feed costs rise or broiler prices fall (A. 27).[6]

Growers bear market risks indirectly as well. The number of chicks or flocks placed with growers may be reduced if broiler prices fall or seem likely to fall (A. 14–16, 27). The duration of a grower's contract is generally limited to one growing cycle of seven to nine weeks (A. 8); growers' contracts have been terminated for a variety of reasons (A. 27–28), and some have been unsuccessful in obtaining new contracts with other integrators (*ibid.*).

2. On April 16, 1973, the United States filed this civil antitrust action against petitioner. The complaint alleged that petitioner's members engaged in various activities—including exchanging price information and restricting the supply of broilers—designed to fix, maintain, and stabilize the price of broilers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner contended, among other things, that its questioned practices were sheltered from the antitrust laws by the Capper-Volstead Act, 7 U.S.C. 291–292.

The Capper-Volstead Act partially exempts from antitrust scrutiny the cooperative activities of "[p]er-

[6] In one case an integrator lowered the payment level by 45 percent (A. 27).

sons engaged in the production of agricultural products as farmers * * *." Petitioner argued that the integrators were farmers.[7]

3. The district court agreed with petitioner's argument that the integrators are "farmers" (A. 81–90). The court thought it dispositive that the integrators bear most of the risks of fluctuation in the market for broilers; it also relied on an appellate opinion that

[7] Petitioner's description of the background of this litigation (Br. 7) is incomplete in some respects. In 1969 the Department issued a business review letter to the National Egg Co., expressing an intent not to institute a criminal prosecution of a cooperative that planned to admit a corporation that contracted with farmers for the care of laying hens and the production of eggs. The letter was issued pursuant to a procedure for case-by-case review of particular proposed actions. The Department expressly reserved the right to change its mind and institute a prosecution if the public interest should so require (28 C.F.R. 50.6).

Petitioner was formed in 1970. It did not seek an indication of the Department's enforcement intentions pursuant to the business review procedure. On November 17, 1971, the Department issued a business review letter to Holly Farms Poultry, Inc., concerning Holly's proposal to join petitioner. The business review letter stated that integrators that contracted with growers for the raising of broilers were not farmers within the meaning of the Capper-Volstead Act, and in a simultaneous press release the Department took the position that agricultural cooperatives might forfeit their limited antitrust exemption if they admitted integrators.

Although the Department of Justice thus made clear its legal position, petitioner continued to operate as before. The Department brought suit 17 months later, seeking only an injunction against petitioner's marketing practices. Whether any defense founded on unfairness would be available in a treble damage action is a question that need not be faced in this case. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592–595; cf. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 24–25.

firms similar to the integrators were farmers for purposes of the National Labor Relations Act.[8]

The United States then filed an amended complaint eliminating any allegations that would have allowed it to argue that the integrators overstepped their limited antitrust exemption as Capper-Volstead "farmers" (A. 92–96).[9] The parties stipulated that the United States could refile a complaint at a later date reviving the allegations that had been deleted (A. 91). Because the amendment to the complaint made the integrators' status as "farmers" the controlling issue in the case, the district court entered summary judgment for petitioner (A. 105–110).[10]

[8] The district court relied on *National Labor Relations Board* v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025 (C.A. 5). But this Court disapproved *Strain* in holding that truck drivers employed by integrators to transport feed to growers are not "agricultural laborers" for purposes of the labor laws. *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, 429 U.S. 298, 299 n. 4. The court of appeals relied in part on *Bayside* in reversing the district court (A. 130–131). See also *Marshall* v. *Abbott Farms, Inc.*, 559 F. 2d 1006 (C.A. 5) (integrated egg producers are not farmers for purposes of the Fair Labor Standards Act).

[9] The exemption is not total; it does not pertain to predatory practices or to conspiracies with persons outside agricultural cooperatives. See *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U.S. 458, 465–467; *United States* v. *Borden Co.*, 308 U.S. 188, 204–206. The Capper-Volstead Act was designed only to allow a cooperative to act as if it were a unitary corporation. But in light of the amendment to the complaint, which eliminated from the case all allegations pertaining to activities that would not be exempt if the integrators are not "farmers," there is no need for the Court to consider what types of activities are exempt.

[10] The question whether the integrators are "farmers" under the Capper-Volstead Act also controls petitioner's claim to anti-

4. The court of appeals reversed (A. 111–132). The court observed that the Capper-Volstead Act exempts only "farmers," not all persons connected with the production of agricultural commodities (A. 121). It first examined the ordinary meaning of "farmer" and concluded that "an irreducible minimum must be either husbandry of animals or crops or farm ownership" (A. 123). Because the integrators neither husband broiler flocks nor own the farms where this task is performed by growers, the court held that they were not farmers (A. 123).

Legislative history reinforced the court of appeals' view that Congress meant to exempt only "farmers" as that term was commonly understood. The court concluded that the Act was designed to bolster the bargaining position of farmers vis-a-vis middlemen, to forestall migration of farmers to the cities, and to preserve the values of independence and individualism nourished by traditional farm life (A. 124–127). Moreover, Congress defeated an amendment that would have included processors, such as sugar refiners that concluded pre-planting contracts with farmers,

---

trust exemption under Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, because that statute provides immunity identical to that available under the Capper-Volstead Act. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 391.

Moreover, although petitioner refers (Br. 23 n. 17) to Section 5 of the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, that section authorizes price information exchanges only if petitioners are "farmers" under the Capper-Volstead Act. The district court did not resolve any question concerning that section (see A. 90), and consequently none is properly before this Court.

among those entitled to antitrust exemption (A. 127).

The court held that the integrators are more like middlemen and processors than they are like traditional farmers (A. 128). It explained that "[r]eading 'farmers' in its ordinary sense as meaning those who own or operate farms focuses the benefits of the Act more closely on the persons central to Congress' concern and it keeps subject to the antitrust laws those companies that prepare farm products for market" (A. 129).

SUMMARY OF ARGUMENT

The growers raise the birds from chick to chicken, from the day after their birth until a brief time before their death. It is as if the growers obtained seedlings from the integrators and returned a mature crop. The growers raise and husband their crop of birds, yet the integrators contend that they, rather than the growers, are "farmers."

The integrators are much more like suppliers and processors than they are like farmers; they are more like the orange packing houses that are outside the protection of the Capper-Volstead Act (see *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 393) than they are like the growers of oranges. The integrators doubtless are engaged in the production of agricultural products—so were the operators of the packing houses—but they are not engaged in that production *as farmers*. As the court of appeals concluded (A. 123): "Asked to examine the broiler busi-

ness and to identify the 'farmers,' Justice Frankfurter's common run of men * * * would point to the contract growers—the persons who own and operate the farms—as the 'farmers.' * * * 'Farmer' still means what it meant in 1922—one who owns or operates a farm."

The legislative history shows that the Capper-Volstead Act is a populist statute designed to advance the cause of "actual farmers" (H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921)), the backbone of the populist movement, against the cause of middlemen and suppliers. Congress rejected an amendment that would have extended to entities similar to integrators the exemption from the antitrust laws. The statute is special interest legislation, hardly intended to give privileges to processors and middlemen that were the objects of suspicion. Faithfulness to the intent of the 67th Congress, and adherence to the rule that exceptions to the antitrust laws must be strictly construed, requires the conclusion that integrators are not farmers.[11]

[11] See generally Landes and Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & Econ. 815, 877, 883, 894 (1975); Kennedy, *Legal Formality*, 2. J. Legal Studies 351 (1973).

ARGUMENT

THE LANGUAGE, LEGISLATIVE HISTORY AND PURPOSES OF THE CAPPER-VOLSTEAD ACT SHOW THAT INTEGRATED BROILER PRODUCERS ARE NOT "FARMERS"

A. THE EXEMPTION FOR "FARMERS" APPLIES ONLY TO PERSONS WHO OWN OR WORK ON AGRICULTURAL LAND

The Capper-Volstead Act exemption from the antitrust laws does not apply to all persons associated with agricultural production. It reaches only persons "engaged in the production of agricultural products *as farmers*, planters, ranchmen, dairymen, [or] nut or fruit growers * * *." 7 U.S.C. 291 (emphasis supplied). Congress intended the language to be restrictive; the House Report explained that the language "aimed to exclude from the benefits of this legislation all but actual farmers" (H.R. Rep. No. 24, *supra*, at 1).

The statute was a response to an agricultural depression. Prices of agricultural commodities fell dramatically after World War I,[12] threatening many farmers with bankruptcy[13] and forcing others to leave the land for the cities.[14] Although farm prices fell, the price of food in the cities rose;[15] Congress concluded that part of this disparity was caused by excess profits of middlemen.[16]

The sponsors of the Capper-Volstead Act believed that these trends, so damaging to farmers and farm

[12] 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg).
[13] 62 Cong. Rec. 2060 (1922) (remarks of Sen. Capper).
[14] 62 Cong. Rec. 2059–2060 (1922) (remarks of Sen. Capper).
[15] 62 Cong. Rec. 2060 (1922) (remarks of Sen. Capper).
[16] *Ibid.*

life, could be arrested if farmers acted collectively as their own middlemen. See *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra,* 389 U.S. at 393–394. They hoped that collective marketing would "increase the producer's profit by shortening the road to market," bypassing "the unessential and speculative middleman," and providing "the producer and the consumer their due." [17] Congress saw in higher profits for farmers a way to make the traditional farming life attractive once more, keeping farmers on the land and nourishing their independence and individual effort in keeping with traditional values.[18]

Congress thought that collaboration among farmers would be a boon for farmers and consumers alike, because in its view the elimination of middlemen would lead to lower prices for consumers. It was anxious, however, "to preserve the principles of the Sherman Act against the oppressive power of wealth and great aggregations of capital or any other organization which may oppress the people." [19] Its concern was reflected, in part, by the provision in Section 2 of the Act, 7 U.S.C. 292, of a procedure to assess the fairness of prices charged by agricultural cooperatives.[20]

---

[17] *Ibid.*

[18] 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg); *id.* at 2058 (remarks of Sen. Capper).

[19] 62 Cong. Rec. 2050 (1922) (remarks of Sen. Kellogg).

[20] The Court has held that the remedy under Section 2 is not exclusive. See *United States* v. *Borden Co.*, 308 U.S. 188, 205–206; *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U.S. 458, 462–463.

In order to exclude from the benefits of the Act persons—such as middlemen and processors—that represented "the oppressive power of wealth and great aggregations of capital," Congress carefully limited the statutory description to persons engaged in agriculture "as farmers," a term that Congress understood to mean holders of land,[21] owners of farms,[22] occupiers of farms,[23] persons cultivating their own land,[24] tillers of the soil,[25] and so on. The descriptive terms point in the same direction: only "actual farmers" [26] may organize into cooperatives free from antitrust scrutiny.[27]

---

[21] 62 Cong. Rec. 2050 (1922) (remarks of Sen. Kellogg).

[22] 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg).

[23] *Ibid.*

[24] *Ibid.*

[25] 59 Cong. Rec. 7855–7856 (1920) (remarks of Rep. Evans).

[26] H.R. Rep. No. 24, *supra*, at 1.

[27] See also, *e.g.*, 59 Cong. Rec. 7855–7856 (1920) (remarks of Rep. Evans: "the liberty sought in this bill for the man who tills the soil"); 59 Cong. Rec. 8017 (1920) (remarks of Rep. Volstead); 59 Cong. Rec. 8022 (1920) (remarks of Rep. Sumners); 59 Cong. Rec. 8025 (1920) (remarks of Rep. Hersman); 59 Cong. Rec. 8026) (remarks of Rep. Towner: "this privilege is not to dealers or handlers or speculators for profit; it is limited to the producers themselves"); 59 Cong. Rec. 8033 (1920) (remarks of Rep. Fields); 61 Cong. Rec. 1034 (1921) (remarks of Rep. Walsh); 61 Cong. Rec. 1037 (1921) (remarks of Rep. Blanton); 61 Cong. Rec. 1040 (1921) (remarks of Rep. Towner: "The farmer is an individual unit. He must manage his own farm. He must have his own home"); 61 Cong. Rec. 1044 (1921) (remarks of Rep. Hersey); 62 Cong. Rec. 2048, 2050 (1922) (remarks of Sen. Kellogg, noting the "individualistic nature of the farmer's occupation" and describing a farmer as "a small holder of land"); 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg, observing that the legislation was designed to encourage the farmer "in his ownership, in

The integrators are not "actual farmers" and do not claim to be so. They do not till the land or husband the flocks. They do not own the land on which the flocks are raised.[28] They contend, rather, that they are entitled to solicitude because they bear market risks and provide a stable income for the growers (Br. 23–26).

This contention proves too much. It overlooks the fact that the Court rejected a similar argument in *Case-Swayne* in concluding that orange processors are not "farmers" (389 U.S. at 391–396) and, indeed, that membership of "nonproducer interests" (*id.* at 396) such as processors in a cooperative strips the entire cooperative of antitrust immunity. Petitioner overlooks the fact that Congress did not include every agricultural interest within the definition of "farmers."[29] And, most importantly, petitioner overlooks the fact that Congress considered and rejected a provision that would have included entities like integrators among those entitled to exemption from the antitrust laws.

Senator Phipps proposed an amendment to exempt from the antitrust laws the activities of manufacturers or producers of agricultural products, provided that they entered into pre-planting contracts with farmers and the farmers' compensation depended on the price of the agricultural commodity.[30] Senator Phipps remarked that processors of milk, sugar beets, chicory, fruits and vegetables—agricultural industries with organizations similar in some ways to that of the broiler industry today—would be eligible for antitrust exemption under his amendment.[31] He contended that the amendment would enable farmers to receive higher prices at the same time as it reduced costs to consumers because of savings in distribution.[32]

The leading supporters of the Capper-Volstead Act opposed the Phipps amendment. Senator Kellogg stated that the amendment would permit processors, mills and manufacturers to obtain exemption from the antitrust laws.[33] Senator Norris argued that the

---

the occupation of his farm, and in the cultivation of his own land"); 62 Cong. Rec. 2052 (1922) (remarks of Sens. Cummins, Kellogg and Townsend); 62 Cong. Rec. 2156 (1922) (remarks of Sen. Walsh, observing that the legislation protects only "an organization of the producers themselves of the product of the farm"); 62 Cong. Rec. 2058–2059 (1922) (remarks of Sen. Capper).

Petitioner relies (Br. 15) on a statement made by an opponent of the Capper-Volstead Act to support a broad interpretation of the term "farmer." Statements by opponents, however, are entitled to little weight. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n. 24.

[28] Petitioner therefore draws no sustenance from the fact that both sharecroppers and the owners of sharecropped land may be "farmers": the sharecroppers work the farmland and the owners own it. Integrators do neither.

[29] See 62 Cong. Rec. 2052 (1922) (flour mills are engaged in the production of agricultural products but are not entitled to claim the antitrust exemption). The Court quoted and relied on this exchange in *Case-Swayne*, *supra*, 389 U.S. at 391–392.

[30] 62 Cong. Rec. 2273 (1922).

[31] 62 Cong. Rec. 2273–2274 (1922).

[32] *Ibid.*

[33] 62 Cong. Rec. 2274 (1922).

amendment would allow processors to raise prices to consumers as long as they shared part of the increased profit with farmers.[34] The amendment was defeated (62 Cong. Rec. 2275 (1922)).

The debates on the Phipps amendment establish that processors, other persons who enter into pre-planting agreements with farmers for crops, and so on, are not themselves farmers even though they bear much of the risk of market fluctuation. Congress thought that it would take an amendment to the bill to exempt such persons from the antitrust laws. And Congress rejected the amendment that was proposed, in large measure because it would have jeopardized the interests of consumers and extended the benefits of the statute to the very middlemen and processors that Congress saw as one cause of the difficulties of farmers.[35] Processors with pre-planting contracts have much in common with the integrators, and the rejection of the Phipps amendment therefore disposes of many of petitioner's arguments.

Congress, in 1922, did not exempt integrators from the antitrust laws. To the extent Congress addressed the status of entities related to integrators, it decided that they were not entitled to the benefits of the statute. Petitioner contends (Br. 12) that farming

[34] 62 Cong. Rec. 2275 (1922).

[35] Petitioner correctly observes (Br. 16) that our interpretation of the Capper-Volstead Act would allow an integrator engaged in "agribusiness" to be treated as a farmer if it also owned the place where the birds were nurtured. But the fact that "farmers" may engage collectively in ancillary activities such as the marketing of farm products is not a reason to extend the statute still further to "agribusinesses" that do *not* grow their own chickens.

has changed since 1922, but this is not a sufficient reason to reverse a choice consciously made by Congress. The language of the statute "is not an empty vessel into which this Court is free to pour a vintage that * * * better suits present-day tastes." *United States* v. *Sisson,* 399 U.S. 267, 297. Petitioner's argument that the integrators deserve to be treated like farmers should be addressed to the sitting Congress; the 67th Congress, which passed the Capper-Volstead Act, did not accommodate integrators, and the prerogative of altering laws to suit changed circumstances belongs to Congress rather than the courts.[36]

B. THE INTEGRATORS' FINANCIAL STAKE IN THE BROILERS DOES NOT MAKE THEM FARMERS

Petitioner's central argument is that the integrators are farmers because they bear most of the risks, and incur most of the costs, of the production of broilers.

[36] Modern technology and changes in economic conditions may have overtaken other farming statutes that were passed long ago. See *United States* v. *Imperial Irrigation District*, 559 F. 2d 509 (C.A. 9) (acreage limitation on land irrigated by public projects may be obsolete, but it must be enforced).

Congress has been attentive to the problems of agriculture, but the most recent statutes simply reinforce our arguments concerning the Capper-Volstead Act. For example, Section 102a of the Food and Agricultural Act of 1977, Pub. L. 95–113, 91 Stat. 913, "reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country." The Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq.*, is to the same effect. See S. Rep. No. 90–474, 90th Cong., 1st Sess. 2–3, 5–6 (1967); Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. 12, 90–96 (1967).

But this Court rejected in *Case-Swayne* the contention that investment and assumption of agricultural risk are enough to make a person a "farmer" under the Capper-Volstead Act.

The growers nurture the birds from the day after birth until shortly before their slaughter. They have day-to-day control over the care of the birds. The contribution of the grower is what turns a bird from a chick into a marketable broiler, just as other farmers tend their fields while the forces of nature turn seeds or seedlings into a mature crop. The growers, not the integrators, invest in farm land and farm buildings. Most of a grower's investment in broiler production is fixed in farm land and farm buildings; an integrator's investment, on the other hand, may be no more than the cost of processing facilities and the cost of a particular flock of birds (A. 9–10, 13, 65).[37] Two members of petitioner own no breeder flocks, hatcheries or feed mills (A. 8, 23); their investment in facilities is limited to processing plants, which, as *Case-Swayne* holds, are not farms.[38]

[37] The growers' fixed investments are those common to farming. They cannot easily be turned to other endeavors if poultry raising should become unprofitable. To cut his losses, a grower may be required to sell or abandon his farm, the result that the Capper-Volstead Act was designed to prevent. Integrators, by contrast, can turn their feedmills to other endeavors (such as selling feed to other livestock raisers).

[38] Petitioner's statement (Br. 17 n. 10) that all of its members are engaged in more than the processing of birds therefore is incorrect. The two members discussed in the text, like the sugar beet processors that the rejected Phipps amendment would have covered, and like the orange packing plant owners discussed in *Case-Swayne*, have no more than an interest in processing, together with investments in particular lots of agricultural products.

Many growers bear market risks directly, because the price they receive from the integrators depends on the price of feed, or processed birds, or both (A. 25–26). The growers also bear market risks indirectly, because the consequence of a decrease in the price of processed birds (or an increase in the price of feed) is a reduction in the number of birds integrators will place for growing (A. 15–16, 27–28), and when integrators place fewer birds, growers are paid less. Integrators may decline to renew a grower's contract after any flock of birds (A. 27), leaving the grower with an investment in farm land and buildings that cannot easily be turned to other uses.[39]

When the price of birds goes down the integrators doubtless suffer, but they do not suffer as farmers. Processors, retailers, and many other persons associated with agriculture bear market risks, but the fact that they do so does not make them farmers.[40]

Petitioner stresses (Br. 15–16) that an integrator's investment in each flock of birds is greater than a

[39] An abandoned farm represents not only a loss to the farmer but also a loss to passersby. "An abandoned farm is an eyesore. It is evidence of local decay, threatening the national fiber, and if permitted to continue imperiling the national health. Let us keep our boys on the farm." 62 Cong. Rec. 2218 (1922) (remarks of Sen. Calder).

[40] In opposing the Phipps amendment despite the fact that sugar refiners had been losing money, Senator Norris observed: "A great many people, a great many retailers, lost money on sugar they had on hand when it went down. I have no joy in seeing anyone lose any money, but I was glad when the price of sugar went down, even though somebody had to lose, and I do not suppose there was any way to put it down without somebody losing." 62 Cong. Rec. 2275 (1922).

grower's, but that disparity is immaterial unless the integrator's investment is made as a farmer; for the reasons discussed above, we submit that it is not.

C. THE CAPPER-VOLSTEAD ACT SHOULD BE CONSTRUED NARROWLY

The Sherman Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4. In combination with other antitrust laws, it is "the Magna Carta of free enterprise." *United States* v. *Topco Associates*, 405 U.S. 596, 610. The Capper-Volstead Act is special-interest legislation that derogates from the general statutory policy; it serves an important purpose, but, because it states the exception rather than the rule, it should be strictly construed.[41] *Case-Swayne Co., supra*, 389 U.S. at 393–394; *United States* v. *Borden Co.*, 308 U.S. 188, 198, 204–206.

Petitioner presses on this Court an inventive and sweeping interpretation of "farmer." To the extent its contentions amount to an invitation to rewrite the

[41] Petitioner asserts (Br. 22) that "the Justice Department can derive no support from the principle that immunities from the antitrust laws must be narrowly construed." This is so, petitioner maintains, because the cooperative activities it carries out are beneficial to the chicken industry. But this argument confuses the question of statutory exemption with the question whether the activities described in the complaint are illegal under the antitrust laws. (What is more, petitioner's emphasis on the benefits of price information exchanges in an atomistic market overlooks the fact that the complaint (A. 94–95) alleges price fixing and restrictions on quantity of birds produced, not simply the exchange of information.)

Capper-Volstead Act to take changed circumstances into account, they are addressed to the wrong forum. To the extent its contentions amount to a plea for consistent treatment, they are mistaken.

Petitioner argues (Br. 18) that the Department of Agriculture and the Farm Credit Administration have treated integrators as farmers and that they should receive the same treatment under the Capper-Volstead Act. But the statutes on which petitioner relies were not passed by the 67th Congress and did not address the problems to which the Capper-Volstead Act was directed.[42]

[42] Petitioner relies, for example, on its treatment under the Farm Credit Act of 1971, 85 Stat. 602, 12 U.S.C. (Supp. V) 2121–2134. But that statute separately defines "producers" and "farmers" (12 U.S.C. (Supp. V) 2129), and petitioner classifies itself as a cooperative of "agricultural producers" (Br. 17) rather than as a cooperative of "farmers." This statute, and petitioner's eligibility for credit under it, therefore have no bearing on the definition of "farmer" for purposes of the Capper-Volstead Act.

Petitioner also has received assistance from the Department of Agriculture under the Cooperative Marketing Act of 1926, 44 Stat. 802, 7 U.S.C. 451–457. But this statute allows the Department to render assistance to cooperatives consisting entirely of "associations of producers of agricultural products, and federations and subsidiaries thereof, engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, financing, insurance, and other cooperative activities" (7 U.S.C. 453(a)). This definition of eligible cooperatives is far broader than the definition contained in the Capper-Volstead Act. The fact that petitioner has received assistance from the Department of Agriculture therefore does not establish that integrators are "actual farmers." (The Department of Agriculture agrees with this interpretation of the Cooperative Marketing Act and the Farm Credit Act.)

None of the agencies that have classified integrators as agricultural producers for some purposes has expressed the opinion that the integrators are immune from antitrust liability under the Capper-Volstead Act; none has even claimed the competence to do so.[43] The assistance that petitioner received from these agencies therefore has no bearing on the question of antitrust immunity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–227; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372–374.

Indeed, the treatment of integrators under other statutes supports the position we take here.[44] For example, the National Labor Relations Board has held that the growers of birds, not the integrators and their employees, are entitled to the agricultural exemption from the National Labor Relations Act. *Imco*

[43] Section 2 of the Capper-Volstead Act allows the Secretary of Agriculture to commence administrative proceedings against cooperatives that charge excessive prices. But discharge of this responsibility to determine the reasonableness of prices ordinarily would not require the Secretary to determine whether a particular person was a "farmer." Moreover, this Court has held that the responsibility given to the Secretary under Section 2 does not affect enforcement of the antitrust laws (see note 20, *supra*), and the Secretary, who has investigated several cases but never filed a Section 2 complaint, has not purported to construe "farmers" in a way favorable to petitioner.

[44] Because "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business" (*Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353), we do not rely heavily on the treatment of integrators under other statutes. But, by the same token, petitioner also draws little support from its treatment under other statutes (see note 42, *supra*).

Poultry, 202 N.L.R.B. 259, 260. This Court accepted that construction of the statute in *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, 429 U.S. 298, which held that the employees who deliver feed to the growers are not agricultural laborers. The Court explained (*id.* at 301) that "[t]he mill in which Bayside produces poultry feed and the processing plant in which it slaughters and dresses poultry are not agricultural operations"; it rejected the integrator's argument that the work of its contract growers converted the labor of its own employees into agricultural labor.[45]

Similarly, employees of integrators are not agricultural employees for purposes of the Fair Labor Standards Act. A regulation of the Secretary of Labor so provides (29 C.F.R. 780.126), and the Secretary's interpretation of the Act has been upheld by the courts. *Marshall* v. *Abbott Farms, Inc.*, 559 F. 2d 1006 (C.A. 5); *Marshall* v. *Gulf & Western Industries, Inc.*, 552 F. 2d 124 (C.A. 5). See generally, *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 761.

Petitioner ultimately falls back on the argument that enforcement of the antitrust laws in the poultry industry would be counterproductive because it would either induce integrators to acquire farms or increase

[45] Petitioner's contention (Br. 19) that Bayside's employees were not agricultural laborers because the feed they delivered is not an agricultural product is incorrect. Chicken feed is made from grain and is an agricultural product; the Court's holding had nothing to do with the proper characterization of chicken feed.

the market share of the larger, more diversified poultry producers (Br. 17, 24–27). But no evidence in the record supports petitioner's contention, and petitioner's prediction is not self-evident.

Many considerations, including the tax laws, the labor relations of the integrators, and the economic efficiency of further integration may be primarily responsible for shaping the structure of the poultry business.[46] Applying the antitrust laws to the broiler business might lead to the formation of additional cooperatives of growers, an outcome that would advance the purposes of the Capper-Volstead Act. One of petitioner's members is a cooperative of growers (A. 9, 29), and petitioner does not suggest that there are impediments to the formation of additional grower cooperatives.

However that may be, petitioner's argument is an empirical contention that should be addressed to Congress. It is not a reason to exempt integrators from antitrust scrutiny under existing laws (see note 41, *supra*.)

[46] Integrators might hesitate to acquire growers because of the capital investment involved (A. 13) or because farm employees' productivity is lower than that of independent farmers (*Broiler Business* 10–11 (October 1976)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JOHN H. SHENEFIELD,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
JOHN J. POWERS, III,
BRUCE E. FEIN,
Attorneys.

JANUARY 1978.